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Supreme Court, U.S.
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No. 99-1209

IN THE

Supreme Court of the United States

NOVATO FIRE PROTECTION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. The petition demonstrated that the Ninth Circuit's decision defies a host of cases decided by this Court over the last half-century. Those cases have recognized that the doctrine of intergovernmental tax immunity has been on a "long path in decline and has now been 'thoroughly repudiated' by modern case law," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174 (1989), and is, therefore, now confined to the "tight limits this Court has set," *Jefferson County, Alabama v. Acker*, 119 S. Ct. 2069, 2077 (1999). Accordingly, "[s]o long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise." *Washington v. United States*, 460 U.S. 536, 540 (1983).

The Novato Fire Protection District ("NFPD") showed that it had not "directly laid [a tax] on the Federal Government" because all of the revenues at issue flow to NFPD solely as a result of contracts voluntarily entered into by the United States Navy to pay NFPD for fire services. *See United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (A "tax" is "an 'enforced contribution to provide for the support of the government.'") NFPD also showed that the prices charged in that contract were "nondiscriminatory" because they did not exceed tax rates used by NFPD in providing fire services to residents within the fire district. And far from "declar[ing] otherwise," Congress in 15 U.S.C. § 2210 has explicitly recognized that local governments can recover "taxes or payments in lieu of taxes" from the United States for the provision of fire services.

The Government does not depreciate the significance of the constitutional issue decided by the Ninth Circuit in this case. Instead, it defends the decision below on the ground that it was "correct." Br. in Opp. 7. The Government's only other argument is that the decision is "supported by

independent state-law grounds," *id.*, even though the Ninth Circuit's failure to so hold strongly suggests that the arguments advanced by NFPD in the court of appeals (*see* Pet. 6 n.3) persuaded the court that it could not rule for the Government on state-law grounds. *See id.* at 7, quoting *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999), which identified the "deeply rooted" doctrine of avoiding the invalidation of governmental action as unconstitutional if other grounds for decision are available.

2. The Government's attempt to show that the Ninth Circuit was "correct" in characterizing contract payments made by the Navy to NFPD as a "tax" that is "directly laid on the Federal Government" is based on the rhetoric of its brief, not the reality of the undisputed facts in this case. The Government repeatedly refers to the charges collected by NFPD as a "levy" or an "assessment" by NFPD upon the United States. *See* Br. in Opp. 8 (NFPD "sought to levy"); *id.* at 9 (by "assessing the fee . . . NFPD levied an ad valorem property tax"); *id.* at 14 ("a locality may not, as NFPD has here, assess an ad valorem tax"). The Government is forced into this characterization of the charges collected by NFPD because it acknowledges that under this Court's decisions, the *only* prohibition under the intergovernmental tax immunity doctrine that it can invoke is that "a State may not, consistent with the Supremacy Clause . . . lay a tax 'directly on the United States.'" *Washington v. United States*, 460 U.S. at 547.[1]

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[1] The Government also refers to the anti-discrimination prong of the doctrine in the opening paragraph of its argument, Br. in Opp. 7, but it never takes issue with NFPD's argument that there is no discrimination here against the United States. *See* Pet. 13 n.6.

Like the Ninth Circuit, Pet. App. 6a-7a, the Government's predicate for analogizing the charges here to a tax is that they were calculated on the bases of the rate that NFPD might have used to tax the property if it were within the NFPD. Br. in Opp. 9. However, the calculation of NFPD's fee for services to the Navy is not the "levying," "laying," or "assessment" of a tax; it is a contractually-agreed upon price. If the Navy (or now the Coast Guard) believed that the price was too high, it could have bargained for a different price, found a different provider of the service, or provided the service itself. *See* Pet. App. 18a (district court's holding that, for this reason, the NFPD's action "does not have the compulsory character of a tax").

Charges under a contract are not "levies" of taxes imposed by a sovereign on an entity that is forced to accept them. Indeed, it is the potential clash of sovereigns that arises when a State asserts the power to *force* the Federal Government to pay a tax – which did not happen here – that lies at the heart of the intergovernmental tax immunity doctrine in the limited circumstances where it still applies. *United States v. New Mexico*, 455 U.S. 720, 735 (1982). Plainly, the Ninth Circuit extended the intergovernmental tax immunity doctrine beyond the tight boundaries established by this Court's modern cases when it held that agreed-upon payments pursuant to contracts are unconstitutional.[2]

3. The Government's suggestion that this Court should deny certiorari because of the independent "state-law grounds" that purportedly sustain the decision below invites

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[2] The Government attempts to distinguish *Washington* on the ground that it did not involve a tax laid directly on the United States. Br. in Opp. 10-11. In this case, however, not only is there no tax laid directly on the United States – there is no tax (*i.e.*, no "enforced contribution") at all.

the Court to leave as the law of the Ninth Circuit a deeply flawed decision in an area of constitutional law that has always been of great concern to this Court. While there is good reason to believe that the Ninth Circuit concluded that there were no independent state-law grounds that could sustain the decision below, *see* p. 2, *supra*, this Court need only correct the Ninth Circuit's manifest error in deciding the constitutional issue and remand to allow the court of appeals to determine the state law question. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986) (remanding for consideration of a state law issue not reached by the court of appeals because that court "is in a better position to evaluate such an issue of state law than we are") (citations omitted). *See also Hutchinson v. Proxmire*, 443 U.S. 111, 123 (1979) ("assum[ing] that the Court of Appeals is as familiar as we are with the general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues," and deciding a constitutional issue based on "an indication that the Court of Appeals would not affirm the state-law holding") (internal quotation and citation omitted).[3]

The Court should similarly not be deterred from granting the petition on the grounds that this case entails "unique circumstances." Br. in Opp. 8, quoting the court of appeals' opinion. The circumstances are "unique" only in the sense that a worst-case example of the misapplication of a constitutional principle is always "unique." The "unique" circumstances here are that the Federal Government has for the first time sought to escape contractually agreed-upon

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[3] The Government's brief in opposition to certiorari makes no effort to answer NFPD's objections to the district court's state-law holdings, which were acknowledged by the district court itself. *See* Pet. 6 n.3.

payments by re-characterizing them as a "tax." It is also "unique" because the Government did not take this position until 20 years after it entered into the contract.

4. Strangely, the Government devotes more than two pages of its opposition (pp. 11-13) to a discussion of 15 U.S.C. § 2210, apparently for the purpose of rebutting an argument that the statute "waive[s] federal immunity from state and local taxation" for "taxes that support local fire services." Br. in Opp. 12-13 & n.3. But NFPD never argued that § 2210 *is a waiver* of immunity. Instead, it referred to § 2210 for the very different purpose of illustrating that, while "Congress *can confer* an immunity from taxation" (emphasis added) – a factor which this Court has recognized in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 (1989), as a reason for adhering to a narrow constitutional doctrine of federal immunity from state taxation, *see* Pet. 13-15 – it did not do so in § 2210. To the contrary, Congress recognized that local governments could receive "taxes or payments in lieu of taxes" for such service wholly outside the additional reimbursement potentially available under that section.

5. The Government's only answer to NFPD's argument based on *Printz v. United States*, 521 U.S. 898 (1997), *see* Pet. 16-19, is that the Federal Government does not "command" the NFPD to provide it with free fire services, but instead "the State of California has imposed on NFPD the obligation to provide fire services *within its District*." Br. in Opp. 14-15 (emphasis supplied). Of course, this argument begs the question whether NFPD complied with state law when it deannexed Hamilton Field. If, as the Ninth Circuit assumed, NFPD's deannexation complied with state law, the Federal Government has indeed "commanded" NFPD to provide free fire services because nothing in state law requires it to provide such services *outside its District*.

The Government's answer to NFPD's argument that it has an "ad infinitum" obligation to provide free services to the United States under the court of appeals' decision is similarly flawed. *See* Br. in Opp. 14, asserting that NFPD's obligation arises under "state, not federal, law," and that NFPD has a "state-law duty to provide those services to federal properties *within its borders*." (emphasis supplied).

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the writ of certiorari sought in the petition.

Respectfully submitted,

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